

# An Argument for the Reasonable Woman Standard in Hostile Environment Claims

## I. INTRODUCTION

In 1986, the Supreme Court recognized “hostile environment” sexual harassment as a cause of action under Title VII of the Civil Rights Act.<sup>1</sup> The hostile environment cause of action has generated decisions in which lower courts have adopted a novel “reasonable woman” standard for evaluating such claims.<sup>2</sup> The adoption of the “reasonable woman” standard is noteworthy not only because it signals a departure from the traditional “reasonable person” standard, but because it flows from an express interpretation of the purpose of Title VII, and because it represents an implicit incorporation of principles of pluralism into the formulation of a judicial standard.

The adoption of the reasonable woman standard is open to criticism on several fronts: that courts adopting the reasonable woman standard incorrectly interpret the purpose of Title VII; that victim-specific pluralistic principles which underlie the reasonable woman standard destructively fragment the judicial decisionmaking process; and even that the reasonable woman standard is, although more pluralistic than the reasonable person standard, still inadequate to address the needs of victims, and fails to truly represent and validate the multitude of perspectives among women or victims.

In this Note, I will examine the rationale behind the adoption of the reasonable woman standard and address the criticisms listed above. In Part II of this Note, I will examine the history of the hostile environment cause of action. In Part III, I will discuss the language of the *Meritor* decision and the possible applications that the opinion invites. In Part IV, I will examine lower courts’ applications of *Meritor*. I will analyze the majority and dissenting opinions in *Rabidue v. Osceola Refining Co.*<sup>3</sup> as examples of the principled bases of the different applications of *Meritor*, and look at other decisions applying standards similar to those adopted in *Rabidue*. I will also consider *Ellison v. Brady*,<sup>4</sup> in which the United States Court of Appeals for the Ninth Circuit adopted the reasonable woman standard based on the rationale articulated in the *Rabidue* dissent. In Part V, I will address criticism of the reasonable woman standard and suggest that the adoption of the standard flows from a credible construction

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<sup>1</sup> *Meritor Savings Bank, F.S.B. v. Vinson*, 477 U.S. 57 (1986).

<sup>2</sup> See *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991); *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3d Cir. 1990).

<sup>3</sup> *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

<sup>4</sup> *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991).

of Title VII, and that the pluralism implicit in the standard is a necessary reflection of shared understandings about our political and judicial decisionmaking systems. In Part VI, I will conclude that the reasonable woman standard, although imperfect, takes a step in the direction of meaningful "equal protection" under the law, and allows for further adjustment and improvement as courts continue to decide hostile environment cases.

## II. HOSTILE ENVIRONMENT SEXUAL HARASSMENT AS A CAUSE OF ACTION UNDER TITLE VII

Title VII of the Civil Rights Act of 1964 provides in relevant part that "[it is] an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of an individual's . . . sex . . . ."<sup>5</sup> Two causes of action for sexual harassment have been recognized by the courts: "quid pro quo" harassment claims and "hostile work environment" claims.<sup>6</sup> In a quid pro quo cause of action, the plaintiff alleges that the employer has explicitly conditioned an employment benefit on the employee's sexual acquiescence, or has threatened a detriment if the employee refuses to acquiesce.<sup>7</sup> In a hostile environment claim, the plaintiff alleges that continued subjection to sexually offensive treatment in the workplace has become an implicit condition of employment.<sup>8</sup>

## III. *MERITOR SAVINGS BANK, FSB v. VINSON*

The United States Supreme Court in *Meritor Savings Bank, FSB v. Vinson* held that hostile environment sexual harassment constitutes illegal sex discrimination under Title VII.<sup>9</sup> In so holding, the Court acknowledged the validity of several lower court decisions which had recognized hostile environment sexual harassment claims.<sup>10</sup> Because Title VII itself provides no guidelines for deciding hostile environment sexual harassment claims, the

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<sup>5</sup> Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (1988).

<sup>6</sup> See generally *Ellison*, 924 F.2d at 875; ARTHUR LARSON, EMPLOYMENT DISCRIMINATION § 41.61 (1989); CATHARINE A. MACKINNON, THE SEXUAL HARASSMENT OF WORKING WOMEN 32-47 (1979).

<sup>7</sup> *Ellison*, 924 F.2d at 875.

<sup>8</sup> *Id.*

<sup>9</sup> *Meritor*, 477 U.S. at 66.

<sup>10</sup> *Id.*; see also *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982); *Bundy v. Jackson*, 641 F.2d 934, 943-45 (D.C. Cir. 1981).

Supreme Court in *Meritor* looked to the Equal Employment Opportunity Commission's ("EEOC") 1980 Guidelines, which provide in part:

(a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . (3) such conduct has the purpose and effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

(b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.<sup>11</sup>

### A. *Different Readings Are Possible Under Meritor*

The Supreme Court in *Meritor* provided no definitive standard for evaluating hostile environment claims, and in acknowledging lower court decisions in analogous cases, invited at least two significantly different characterizations of what constitutes hostile environment sexual harassment. These characterizations implicitly communicate two starkly different notions of the purpose of Title VII, and have the potential to yield very different results in otherwise identical cases. Lower courts looking to *Meritor* have struggled in determining what constitutes a "hostile environment" and have come to different conclusions as to what standard is appropriate for deciding such cases.

### B. *Sources of Courts' Differing Readings of Meritor*

The Supreme Court in *Meritor* approved of the EEOC Guidelines outlining a hostile environment cause of action, and also included quotations from two lower court decisions, *Rogers v. EEOC*,<sup>12</sup> and *Henson v. Dundee*,<sup>13</sup> which recognized, respectively, race-based and gender-based hostile environment harassment. In approving of the EEOC Guidelines, the Supreme Court stated, "[i]n concluding that so-called 'hostile environment' (*i.e.*, non quid pro quo) harassment violates Title VII, the EEOC drew upon a substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees

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<sup>11</sup> 29 C.F.R. § 1604.11(a)-(g) (1980).

<sup>12</sup> *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971).

<sup>13</sup> *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982).

the right to work in an environment *free from discriminatory intimidation, ridicule, and insult.*"<sup>14</sup> Section 1604.11(a) of the EEOC Guidelines (reproduced above) provides generally that "[h]arassment on the basis of sex" is a violation of Title VII, and then states that "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute harassment" if they unreasonably interfere with an individual's work performance, or if they create an intimidating, hostile or offensive work environment."<sup>15</sup> The quotations taken from *Rogers* and *Henson* resemble this EEOC Guideline. Each begins with an acknowledgment of hostile environment sexual harassment as a cause of action, then follows with an example (italicized in the following quotations) of a situation which would constitute such harassment. The portion of the *Rogers* opinion quoted in *Meritor* stated:

[The] phrase "terms, conditions or privileges of employment" in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. . . . *One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers . . .*<sup>16</sup>

The portion of the *Henson* opinion quoted in *Meritor* stated:

Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. *Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.*<sup>17</sup>

The Court in *Meritor* also cited to another passage from *Henson* which stated that for sexual harassment to be actionable, "it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"<sup>18</sup>

As the Court provided no concrete guidelines for determining what standards to apply in determining whether a workplace was a hostile environment, lower courts have frequently looked to passages from the EEOC

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<sup>14</sup> *Meritor*, 477 U.S. at 65 (emphasis added).

<sup>15</sup> 29 C.F.R. § 1604.11(a) (1980).

<sup>16</sup> *Meritor*, 477 U.S. at 66 (quoting *Rogers*, 454 F.2d at 238) (emphasis added).

<sup>17</sup> *Id.* at 67 (quoting *Henson*, 682 F.2d at 902) (emphasis added).

<sup>18</sup> *Id.* at 67 (quoting *Henson*, 682 F.2d at 904).

Guidelines and from *Rogers* and *Henson* to guide them in their decisionmaking. Some courts have focused on the language in the EEOC Guidelines which states that individuals are entitled to a workplace "free from discriminatory intimidation, ridicule, and insult," and have measured alleged harassing behavior in relation to a workplace "free from" such harassment.<sup>19</sup> By measuring allegedly hostile environments in relation to a harassment-free environment, such courts have, either implicitly or explicitly, read the passages from the EEOC Guidelines and from *Rogers* and *Henson* as illustrative of hostile environments, but not as defining environments presenting an actionable claim. One court explicitly read section 1604.11(a) of the EEOC Guidelines as providing first a general acknowledgement of sexual harassment as a cause of action under Title VII, and second, an illustration of actionable harassment, but not an exclusive definition of actionable conduct.<sup>20</sup>

We read the first sentence, that harassment based on sex is a violation of Title VII, to be the general concept, and the second sentence as merely an illustration of how explicit sexual conduct could rise to this level. But, if the second sentence were to modify the first, it would seem to imply that only explicit sexual harassment would be actionable. This reading does not appear to be consistent with either the wording of the EEOC Guidelines or the prevailing case law.<sup>21</sup>

These courts read the quoted passages as providing examples of conduct or environments which constitute hostile environment sexual harassment under Title VII, but they do not treat the EEOC Guidelines description of harassing behavior, nor the *Rogers* and *Henson* descriptions, as threshold levels necessary to state a cause of action.<sup>22</sup> Courts reading the *Meritor* decision in this way have been more likely to adopt the reasonable woman or reasonable victim standard.

Other courts have measured allegedly hostile environments against the level of sexually harassing conduct present, and therefore reasonably expected, in society at large or in a particular sort of workplace.<sup>23</sup> These courts have read the "free from" EEOC language as guaranteeing a work environment free from

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<sup>19</sup> See *Ellison v. Brady*, 924 F.2d 872, 877-78 (9th Cir. 1991).

<sup>20</sup> See *Andrews v. Philadelphia*, 895 F.2d 1469, 1485 (3d Cir. 1990).

<sup>21</sup> *Id.* at 1485 n.6.

<sup>22</sup> See *Andrews*, 895 F.2d at 1485 n.6; *Ellison*, 924 F.2d at 877-78.

<sup>23</sup> See *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987); *Scott v. Sears, Roebuck & Co.*, 798 F.2d 210 (7th Cir. 1986); *Caleshu v. Merrill Lynch, Pierce, Fenner & Smith*, 737 F. Supp. 1070 (E.D. Mo. 1990); *Vermett v. Hough*, 627 F. Supp. 587 (W.D. Mich. 1986).

a level of sexually harassing conduct beyond the level a reasonable person would expect, given contemporary societal and workplace attitudes. Such courts have tended to treat the *Rogers* quotation, which refers to "working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers," as defining the threshold for a hostile environment cause of action, often seeking evidence of the victim's psychological debilitation as they evaluate a claim.<sup>24</sup> These courts have decided cases by using the purportedly gender-neutral "reasonable person" standard, and have rejected a reasonable woman or reasonable victim standard.<sup>25</sup>

The courts measuring harassment in relation to a harassment-free workplace and adopting a victim-specific standard such as the reasonable woman standard either expressly or implicitly adopt a broad construction of the purpose of Title VII. These courts construe Title VII as a mechanism for effecting change in workplace conduct at a pace that is faster than change is occurring in society generally. These courts, by adopting a victim-specific standard, incorporate a pluralistic element into their jurisprudence.

Courts measuring harassment against existing societal or workplace norms construe Title VII's purpose more narrowly, arguing that the statute should not and cannot create workplace standards for non-harassment which are more stringent than societal norms. These courts implicitly reject pluralism in formulating a standard.

I will argue that the latter reading of *Meritor* cannot be justified by the language of the opinion nor by the decisions the Supreme Court acknowledges in the opinion. Furthermore, I will suggest that the principles implicit in this reading of *Meritor* actually undercut the effectiveness of Title VII and are inconsistent with, and unacceptable within, a diverse, pluralistic democracy. I will suggest instead that the broader construction of Title VII's purpose is consistent with the basic notion of remedial legislation such as Title VII, and that a reasonable woman or reasonable victim standard is necessary to further this purpose. The reasonable woman standard also indicates an adjustment that makes the legal/judicial system more responsive to the needs of a pluralistic society.<sup>26</sup>

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<sup>24</sup> See *Scott*, 798 F.2d at 213; *Caleshu*, 737 F. Supp. at 1081-82.

<sup>25</sup> *Scott*, 798 F.2d at 213; *Caleshu*, 737 F. Supp. at 1081-82.

<sup>26</sup> In analyzing courts' application of *Meritor*, I will be focusing on cases representative of the rationale rather than providing an exhaustive treatment of all hostile environment cases decided since *Meritor*.

IV. LOWER COURTS' APPLICATION OF *MERITOR*

Some appellate courts have avoided deciding what standard to apply to hostile environment cases by relying on a "clearly erroneous" standard of review, and have either affirmed or reversed lower court holdings on that ground alone.<sup>27</sup> Courts directly addressing the issue of what standard to apply under *Meritor* tend to either adopt a narrow construction of Title VII and apply the reasonable person standard,<sup>28</sup> or a broader construction of Title VII and apply a reasonable woman or reasonable victim standard.<sup>29</sup>

A. *Title VII Narrowly Construed: The Argument For the Reasonable Person Standard*

In *Rabidue v. Osceola Refining Co.*,<sup>30</sup> the United States Court of Appeals for the Sixth Circuit affirmed the trial court's holding that although a male employee's language and office poster displays constituted "verbal conduct of a sexual nature" within the meaning of the EEOC's guidelines on sexual harassment, the language and posters did not create "an environment of harassment necessary to support a charge of sexual harassment."<sup>31</sup>

The trial court record indicated that the plaintiff Vivien Rabidue's alleged sexual harassment arose primarily as a result of her "unfortunate acrimonious working relationship" with another employee, Douglas Henry.<sup>32</sup> The record stated that Mr. Henry was "an extremely vulgar and crude individual who customarily made obscene comments about women generally, and, on occasion, directed such obscenities at the plaintiff."<sup>33</sup> Management knew of Henry's vulgarity, but informal discussions with him on the subject had been "unsuccessful at curbing his offensive personality traits."<sup>34</sup> The dissent in

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<sup>27</sup> See, e.g., *Staton v. Maries County*, 868 F.2d 996 (8th Cir. 1989).

<sup>28</sup> See, e.g., *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611 (6th Cir. 1986); see also Wendy Pollack, *Sexual Harassment: Women's Experience vs. Legal Definitions*, 13 HARV. WOMEN'S L.J. 35, 60 (1990) (arguing that *Meritor* opted for a strict standard).

<sup>29</sup> See, e.g., *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991); *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3d Cir. 1990).

<sup>30</sup> 805 F.2d 611 (6th Cir. 1986), *cert denied*, 481 U.S. 1041 (1987); see also *Jordan v. Clark*, 847 F.2d 1368, 1373 (9th Cir. 1988), *cert. denied sub nom. Jordan v. Hodel*, 488 U.S. 1006 (1989).

<sup>31</sup> *Rabidue*, 805 F.2d at 614.

<sup>32</sup> *Id.* at 615.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

*Rabidue* included a more graphic description of the work environment evaluated by the trial court, noting the following facts:

One poster, which remained on the wall for eight years, showed a prone woman who had a golf ball on her breasts with a man standing over her, golf club in hand, yelling "Fore." . . . Henry routinely referred to women as "whores," "cunt," "pussy," and "tits." Of plaintiff, Henry specifically remarked "All that bitch needs is a good lay" and called her "fat ass."<sup>35</sup>

After reviewing the EEOC Guidelines and legal precedent, the majority concluded that to prevail in a Title VII hostile work environment action, the plaintiff must assert and prove that "the charged sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance and creating an intimidating, hostile, or offensive working environment that affected seriously the psychological well-being of the plaintiff."<sup>36</sup> The majority's requirement that to be actionable the harassment must "seriously affect the psychological well-being of the plaintiff" does not appear in either the EEOC Guidelines or the Supreme Court's opinion in *Meritor*. Apparently, the majority incorporates this requirement based on the *Rogers* quotation in the *Meritor* opinion acknowledging the possibility of work environments "so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers."<sup>37</sup> The Court in *Meritor* made no indication that the description was intended as a standard for actionability.<sup>38</sup>

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<sup>35</sup> *Id.* at 624 (Keith, J., concurring in part, dissenting in part) (citation omitted).

<sup>36</sup> *Id.* at 619. Additional elements of a colorable claim not directly related to this discussion include: (1) that the employee be the member of a protected class; (2) that the employee be subjected to unwelcome sexual harassment in the form of sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature; (3) that the harassment complained of be based upon sex; and (4) that the employee prove the existence of respondeat superior liability. See *Ellison v. Brady*, 924 F.2d 872, 875-76 (9th Cir. 1991) (citing *Jordan v. Clark*, 847 F.2d 1368 (9th Cir. 1988), *cert. denied sub nom. Jordan v. Hadel*, 488 U.S. 1006 (1989)).

<sup>37</sup> In *Ellison*, the Ninth Circuit postulated that the *Rabidue* court had taken its requirement of psychological debilitation from the quotation of *Rogers* in *Meritor*. *Ellison v. Brady*, 924 F.2d 872, 888 n.8 (9th Cir. 1991).

<sup>38</sup> *Meritor*, 477 U.S. at 66 (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971)). To treat the conditions described in the *Rogers* opinion as a threshold for a hostile environment sexual harassment claim is arguably to take the quotation out of the context of both the *Meritor* opinion and the original *Rogers* case, in which the Fifth Circuit applied no such requirement of "psychological debilitation." In *Rogers*, the Fifth Circuit allowed discovery regarding the plaintiff's charge that as a minority employee in a nursing care



The *Rabidue* majority then applied a “reasonable person” standard combined with a requirement that the plaintiff show “actual harm” as a result of the alleged harassment.<sup>39</sup> The court stated that “to accord appropriate protection to both plaintiffs and defendants,” the trier of fact, taking into consideration the totality of the circumstances, “must adopt the perspective of a reasonable person” subjected to “a similar environment under essentially like or similar circumstances.”<sup>40</sup> The court explained that:

[I]n the absence of conduct which would interfere with that hypothetical reasonable individual’s work performance and affect seriously the psychological well-being of that reasonable person under like circumstances, a plaintiff may not prevail on asserted charges of sexual harassment anchored in an alleged hostile and/or abusive work environment regardless of whether the plaintiff was actually offended by the defendant’s conduct.<sup>41</sup>

The court then held that under this standard the plaintiff had failed to show that the alleged harassing behavior and poster displays would be offensive to a reasonable person subjected to the same circumstances, and therefore could not prevail on the hostile environment claim.<sup>42</sup> The court reasoned:

In the case at bar, the record effectively disclosed that Henry’s obscenities, although annoying, were not so startling as to have affected seriously the psyches of the plaintiff or other female employees. The evidence did not demonstrate that this single employee’s vulgarity substantially affected the totality of the workplace.<sup>43</sup>

The majority opinion also stated that a “proper assessment or evaluation” of an allegedly hostile environment required consideration of various factors, both subjective and objective, such as:

the nature of the alleged harassment, the background and experience of the plaintiff, her co-workers, and supervisors, the totality of the physical environment of the plaintiff’s work area, the lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff’s

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facility, she was subjected to a hostile environment when the employer segregated minority patients in the facility. There was no mention in *Rogers* of a requirement that the plaintiff demonstrate that the alleged harassment had a severe psychological impact. *Rogers*, 454 F.2d at 241.

<sup>39</sup> *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 622.

<sup>43</sup> *Id.*

introduction to its environs, coupled with the reasonable expectation of the plaintiff upon voluntarily entering that environment.<sup>44</sup>

The *Rabidue* majority explicitly rejects the notion that the purpose of Title VII is to provide a workplace "free from" the harassment that exists at a significant level in society at large, and quotes with approval the district courts's opinion stating:

Indeed, it cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to—nor can [it]—change this. It must never be forgotten that Title VII is the federal court mainstay in the struggle for equal employment opportunity for the female workers of America. But it is quite different to bring about a magical transformation in the social mores of American workers.<sup>45</sup>

The majority's rationale and resulting "reasonable person" standard, with consideration of a multitude of additional factors, flow from the assumption that Title VII's purpose is not to eliminate sexual harassment entirely from the workplace, but rather to ensure that levels of sexual harassment in the workplace do not exceed levels in society generally. Indeed, the majority opinion suggests that an individual assumes the risk of a level of sexually charged conduct upon "voluntarily entering" certain work environments which have a pre-established level of offensive behavior. Under such circumstances, the individual offended by the conduct has no colorable complaint unless the level of harassment exceeds that which a reasonable individual would expect in such a setting.<sup>46</sup>

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<sup>44</sup> *Id.* at 620.

<sup>45</sup> *Id.* at 620-21.

<sup>46</sup> *Id.* The majority's "assumption of the risk" argument would be more applicable to workplace harassment if employees entered the working world absent any compulsion, and could therefore leave upon encountering undesirable conditions. Similarly, even if compelled to work, an employee might be said to "assume the risk" of a hostile work environment if other comparable work at comparable pay were readily available, and the harassed employee could easily move to another job. However, the overwhelming majority of employees, women and men, do not experience employment as an optional activity, nor can they easily move from one job to another with no adverse effects. Women in particular have less latitude in the employment market, because fewer well-paying jobs are available to women, because women earn only about 70% of what men earn for full-time employment, and because a woman is just as likely to be supporting a family with children as a man. See generally FRANCINE D. BLAU AND MARIANNE A. FERISER, *THE ECONOMICS OF WOMEN, MEN AND WORK* (1986).

By using a "reasonable person" standard and considering "social mores" of sexually offensive behavior, the *Rabidue* majority implicitly does two things: it aligns Title VII protection with societal attitudes, and it endorses the notion that there exists an "acceptable" level of harassing behavior in each workplace.

The majority states that the events complained of by the plaintiff, although "annoying, were not so startling as to have affected seriously the psyches of the plaintiff or other female employees."<sup>47</sup> By characterizing the atmosphere described in the trial court record as "annoying," the majority suggests that such an atmosphere must be expected and tolerated by female employees. In a footnote, the majority further emphasizes its conclusion that the incidents and displays complained of were trivial by comparing them to facts of other cases in which hostile environment sexual harassment was found.<sup>48</sup> In those cases the plaintiffs were subjected to "continual personal and telephonic sexual propositions both at work and at . . . home" and "numerous harangues and demeaning inquiries . . . vulgarities, and repeated requests for sexual relations" from supervisors.<sup>49</sup> By contrast, the *Rabidue* case "involved no sexual propositions, offensive touchings, or sexual conduct of a similar nature that was systematically directed to the plaintiff over a protracted period of time."<sup>50</sup> It seems the majority is comparing the plaintiff's allegations to "norms" of sexually hostile environments, and is in essence saying that to be severely affected by the environment in *Rabidue* (trivial in comparison to other work environments to which women have been subjected) is "unreasonable," therefore no hostile environment sexual harassment is present. Again, this is a comparison to an existing "norm" which is allowed to continue to determine the working conditions, expectations, and remedies of women in the workplace.

Other courts signing onto the *Rabidue* standard have even more clearly endorsed the idea that a certain type and level of harassment may be reasonably expected and is thus acceptable. For example, in *Caleshu v. Merrill Lynch*,

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As the dissent points out, the majority's suggestion that a woman employee in some way assumes the risk of working in an abusive, anti-female environment constitutes a contention that "such work environments somehow have an innate right to perpetuation and are not to be addressed by Title VII." *Rabidue*, 805 F.2d at 626 (Keith, J., concurring in part, dissenting in part). The dissent explicitly states that "the hostile environment standard set forth in the majority opinion shields and condones behavior Title VII would have the court redress." *Id.* at 628.

<sup>47</sup> *Id.* at 622.

<sup>48</sup> *Id.* at 622 n.7.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

*Pierce, Fenner & Smith*<sup>51</sup> the District Court for the Eastern District of Missouri considered a case in which a secretary/sales assistant alleged that her supervisor, shortly after he was hired, began inviting her to lunch and asking to date her socially.<sup>52</sup> The plaintiff complained of two incidents in which her supervisor forcibly french kissed her, and two incidents where he touched plaintiff's thigh without her consent.<sup>53</sup> Additionally, he appeared at a private dinner she was attending despite her objection, and showed up at a bar when plaintiff was there.<sup>54</sup> Another female employee testified that the same supervisor placed his hand on her knee without her consent on one occasion, and attempted to kiss her between five and ten times.<sup>55</sup> Another female employee testified that although that same supervisor never asked her out, nor attempted to touch her, she found him offensive.<sup>56</sup> In light of this testimony, the court applied the reasonable person standard and sought evidence of psychological debilitation, and found that the actions did not rise to the level of hostile environment sexual harassment, stating:

Adopting the perspective of a reasonable person's reaction to a similar environment under essentially like or similar circumstances, the Court finds that the total effect of Borgognoni's actions throughout the five months was not such that it could have interfered with a reasonable person's work performance or seriously affected the psychological well-being of that reasonable person. In fact, the Court finds that most of the actions complained of were trivial, such as asking plaintiff to the Mutual Funds dinner, giving plaintiff a gift and card, and showing up at the "Exchange" bar, and telling the jokes.<sup>57</sup>

In *Ebert v. Lamar Truck Plaza*,<sup>58</sup> the District Court for Colorado considered a case in which a female restaurant employee complained of offensive language and unwelcome touching in the workplace. The court found no hostile environment sexual harassment, stating:

The specific instances of use of foul language and alleged unwelcome touching reported by the witnesses were actually sparse. For example, Carla Ebert

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<sup>51</sup> *Caleshu v. Merrill Lynch, Pierce, Fenner & Smith*, 737 F. Supp. 1070 (E.D. Mo. 1990).

<sup>52</sup> *Id.* at 1076.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 1077.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 1082-83.

<sup>58</sup> 715 F. Supp. 1496 (D. Colo. 1987).

testified that she was touched two times in what she felt was an abusive manner, although her tenure at LTP ran from May of 1984 until August of 1985.<sup>59</sup>

Apparently, this court finds that during a period of fifteen months, two incidents of unwelcome touching were reasonable and legally acceptable.

Perhaps one of the more startling applications of *Meritor* in line with the *Rabidue* majority is by the United States Court of Appeals for the Seventh Circuit in *Scott v. Sears Roebuck & Co.*<sup>60</sup> In *Scott*, a female auto mechanic trainee asserted that she was repeatedly harassed by her immediate supervisor, who, she alleged, repeatedly propositioned her, winked at her, and suggested that he give her a "rubdown."<sup>61</sup> The trial court also found that when the plaintiff asked the supervisor for advice or assistance, he would often reply, "what will I get for it?"<sup>62</sup> The plaintiff also alleged that another employee "slapped her on the buttocks and that another mechanic once told her that he knew that she must moan and groan while having sex."<sup>63</sup> The appellate court agreed with the district court's holding that no hostile environment sexual harassment was present, stating that:

the harassment plaintiff was subjected to (even as advanced by plaintiff) was not so severe, debilitating, or pervasive that it created an actionable hostile environment claim within the current interpretation of Title VII. Assuming all the conduct Scott complains of is true, her claim still falls short of what is necessary to maintain an action.<sup>64</sup>

Among the facts additionally considered by the district court were the following: that the supervisor never explicitly asked the plaintiff to have sex, that the supervisor never touched the plaintiff, and that despite the supervisor's "what will I get for it" responses, he never actually withheld advice upon her refusal to "give something" in return.<sup>65</sup> The appellate court looked for evidence of psychological debilitation as a requirement for a hostile environment cause of action, and finding none, also found the plaintiff had no cause of action. The court wrote:

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<sup>59</sup> *Id.* at 1499.

<sup>60</sup> 798 F.2d 210 (7th Cir. 1986).

<sup>61</sup> *Id.* at 211.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 213-14.

<sup>65</sup> *Id.* at 212.

Scott complains of being offensively propositioned, yet the only concrete example she raises is Eddie Gadberry's request that she join him at a mall restaurant after work. As for Gadberry's winks and suggestions he be allowed to give her a rubdown, there is no evidence whatsoever these "hints" were so pervasive or psychologically debilitating that they affected Scott's ability to perform on the job. Furthermore, the comments and conduct of the other mechanics is too isolated and lacking the repetitive and debilitating effect necessary to maintain a hostile environment claim.<sup>66</sup>

Like the *Caleshu* court, the *Scott* court used comparisons with the facts of other cases involving extreme examples of hostile environment sexual harassment (forcible rape was one of the incidents of harassment in *Meritor* to which the court in *Scott* referred), to bolster its rationale for finding the alleged harassment in *Scott* insufficient to support a cause of action.<sup>67</sup>

The *Scott* court also supported its holding with findings that the relationship between the plaintiff and the supervisor allegedly harassing her was friendly, and that the supervisor did not retaliate against the plaintiff when she did not acquiesce. The court stated:

We note, not insignificantly, that when deposed Scott admitted she considered Gadberry her friend. Additionally, there is no evidence of Gadberry becoming bitter due to Scott's refusal to entertain his advances. For example, there is no evidence Gadberry, as a senior brake mechanic, ever withheld advice from Scott or placed her in a disadvantageous position in the workplace. Indeed, the one time Gadberry was asked to evaluate Scott's performance, his response was favorable.<sup>68</sup>

The *Scott* court's focus on the emotional or psychological state of the harasser upon having his advances refused is unique and arguably misplaced in an analysis designed to determine the effect of the work environment on the victim. In addition, by taking notice that the supervisor never actually withheld advice upon the plaintiff's refusal to respond sexually, and that the supervisor evaluated the plaintiff's work performance favorably, the court essentially evaluates the environment according to the elements of a quid pro quo sexual harassment cause of action rather than according to those of a hostile environment cause of action.<sup>69</sup> Because a hostile environment cause of action

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<sup>66</sup> *Id.* at 214.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> See *supra* text accompanying notes 6-7. In a quid pro quo action, the plaintiff alleges that the employer has explicitly conditioned an employment benefit on the

was acknowledged explicitly to address situations in which a quid pro quo action does not lie, but in which the plaintiff suffered detriment as a result of a distinctive form of gender-based discrimination, the facts of an allegation of hostile environment harassment, no matter how compelling, cannot support a quid pro quo cause of action. Thus by applying a quid pro quo analysis to the facts of the case at bar, the *Scott* court had arguably predetermined the outcome.

### B. *Title VII Broadly Construed—The Argument for the Reasonable Woman Standard*

The dissent in *Rabidue* rejects the “reasonable person” standard adopted by the majority, and also explicitly rejects the majority’s narrow construction of the purpose of Title VII.<sup>70</sup> Judge Keith asserts that by applying a “reasonable person” standard and allowing the consideration of a multitude of other factors, the majority allows the standard to be determined largely according to the perspective of the harasser rather than the victim.<sup>71</sup> He explains that a “gender-neutral” reasonable person standard does not reflect the perspective of a female victim, stating that “the reasonable person perspective fails to account for the wide divergence between most women’s views of appropriate sexual conduct and those of men.”<sup>72</sup> He further asserts that by mandating the consideration of the “prevailing work environment,” “the lexicon of obscenity that pervaded the environment both before and after plaintiff’s introduction into its environs,” and the plaintiff’s reasonable expectations upon “voluntarily” entering that environment, the majority suggests that “a woman assumes the risk of working in an abusive, anti-female environment.”<sup>73</sup> He states that the majority, by applying a standard which diminishes the importance of the victim’s perspective by allowing for consideration of past and present workplace norms, “contends that such work environments somehow have an innate right to perpetuation and are not to be addressed under Title VII.”<sup>74</sup>

Judge Keith disagrees with this resulting perpetuation and with the assertion that Title VII is not meant to change work environments where “humor and language are rough hewn and vulgar” and “[s]exual jokes, sexual

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employee’s sexual acquiescence, or has threatened a detriment if the employee refuses to acquiesce.

<sup>70</sup> *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 623 (6th Cir. 1986) (Keith, J., concurring in part, dissenting in part).

<sup>71</sup> *Id.* at 626–27.

<sup>72</sup> *Id.* at 626.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

conversations and girlie magazines may abound.”<sup>75</sup> He states instead, “[i]n my view, Title VII’s precise purpose is to prevent such behavior and attitudes from poisoning the work environment of classes protected under the Act.”<sup>76</sup> Judge Keith explicitly disagrees with the majority’s consideration of the backgrounds of the harasser or other co-workers in determining whether the victim was subjected to hostile environment sexual harassment, stating that “the background of the defendant or other workers is irrelevant.”<sup>77</sup> In comparison, he notes that “[n]o court analyzes the background and experience of a supervisor who refuses to promote black employees before finding actionable race discrimination under Title VII.”<sup>78</sup>

Judge Keith also disagrees with the majority’s contention that societal tolerance of sexually offensive or degrading materials mandates workplace toleration of the same, on the grounds that he does not believe that women (who constitute more than half of “society”) actually “condone the pervasive degradation and exploitation of female sexuality perpetuated in American culture.”<sup>79</sup> Judge Keith asserts that the “relevant inquiry” in hostile environment cases “is what the reasonable woman would find offensive, not society, which at one time condoned slavery.”<sup>80</sup>

In *Ellison v. Brady*,<sup>81</sup> the United States Court of Appeals for the Ninth Circuit broke with the majority opinions in *Rabidue* and *Scott* and instead applied a “reasonable woman” standard, incorporating much of the rationale in Judge Keith’s *Rabidue* dissent into its opinion.<sup>82</sup>

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 627.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* The reaction of Congressional women to the Anita Hill/Clarence Thomas sexual harassment hearings (in which an all white, all male Senate Judiciary Committee evaluated sexual harassment allegations against then-nominee Judge Thomas, after the FBI report on its investigations was made public) suggests that Judge Keith was correct in his observation. See Janet Cawley, *Outcry Stalls Vote on Thomas*, CHI. TRIB., Oct. 19, 1991, at 1C (reporting on a march by seven female members of the House of Representatives to a closed-door meeting of Senate Democrats discussing the nomination in response to an unprecedented telephone protest from constituents across the U.S.).

A year after the Thomas/Hill hearings, reports of sexual harassment had risen 44% nationally. See Polly Basone Elliott, *Outcry Among Women Linked to Hill Thomas Hearings*, CHI. TRIB., Oct. 28, 1992, at 4C.

<sup>80</sup> *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 627 (6th Cir. 1986) (Keith, J., concurring in part, dissenting in part).

<sup>81</sup> 924 F.2d 872 (9th Cir. 1991).

<sup>82</sup> *Id.* at 878–79. The court adopted a “reasonable victim” standard, and applied a “reasonable woman” standard to the facts of the case in which the victim was a woman.



The plaintiff in *Ellison* worked as a revenue agent for the Internal Revenue Service.<sup>83</sup> A male co-worker, Gray, assigned to the same office began asking the plaintiff to lunch, pestering her with unnecessary questions, and hanging around her desk.<sup>84</sup> When Gray wrote the plaintiff a note indicating his disappointment at her refusals to accompany him for lunch,<sup>85</sup> the plaintiff became "shocked and frightened" and left the room.<sup>86</sup> Gray followed her into the hallway, demanding that she talk with him.<sup>87</sup>

When the plaintiff was away for four weeks of training, Gray mailed her a card and a three-page typed letter which she described as "twenty times, a hundred times weirder" than the earlier note.<sup>88</sup> The plaintiff testified that she thought Gray was "crazy," "nuts," that she "didn't know what he would do next," and that she was "frightened."<sup>89</sup> She requested that either she or Gray be transferred because "she would not be comfortable working in the same office with him."<sup>90</sup> Gray was transferred to another office, but when he was scheduled to return to the office where the plaintiff worked, the plaintiff immediately requested a transfer and filed formal sexual harassment charges.<sup>91</sup>

The trial court found that there was no actionable hostile environment harassment, characterizing Gray's conduct as "isolated and trivial."<sup>92</sup> The appellate court reversed, using the trial court's characterization of the facts of the case as an illustration of "the importance of considering the victim's perspective," stating that "analyzing the facts from the alleged harasser's viewpoint, Gray could be portrayed as a modern-day Cyrano de Bergerac," but that the victim "did not consider the acts to be trivial."<sup>93</sup> Instead, the plaintiff was "shocked and frightened."<sup>94</sup>

The *Ellison* court based its focus on the victim's perspective both on a broad construction of the purpose of Title VII, and on its endorsement of

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<sup>83</sup> *Id.* at 873.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 874. The note read, "I cried over you last night and I'm totally drained today. I have never been in such constant term oil [sic]. Thank you for talking with me. I could not stand to feel your hatred for another day."

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 880.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* Unlike the court that decided *Scott*, the *Ellison* court did not find that the harasser's lack of ill will toward the plaintiff cut against an actionable claim.

pluralistic principles. The *Ellison* court asserted that a reasonable woman standard was necessary to minimize the risk of reinforcing the prevailing level of sexual harassment, a level which the "reasonable person" standard allows. The *Ellison* court rejected the *Rabidue* majority opinion's argument that societal norms should determine the level of workplace harassment that is actionable under Title VII.<sup>95</sup> The court in *Ellison* stated that "Congress did not enact Title VII to codify prevailing sexist prejudices. To the contrary, 'Congress designed Title VII to prevent the perpetuation of stereotypes and a sense of degradation which serve to close or discourage employment opportunities for women.'"<sup>96</sup>

The other principle driving the *Ellison* decision is pluralism, which acknowledges the existence and validity of multiple perspectives within a political community.<sup>97</sup> The *Ellison* court acknowledges this principle by stating simply that "conduct that many men find unobjectionable may offend many women."<sup>98</sup> The court supports this statement with citations to sociological<sup>99</sup> and governmental data<sup>100</sup> indicating that "[m]any women share common concerns" regarding sexual harassment which men do not necessarily share.<sup>101</sup> Citing to Justice Department statistics, the *Ellison* court observed that "because women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior."<sup>102</sup> Conversely, the court noted that "men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive."<sup>103</sup>

To accommodate for the normative difference between the perspectives of men and women on sexual harassment, the *Ellison* court adopted the reasonable

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<sup>95</sup> *Id.* at 878, 880-81.

<sup>96</sup> *Id.* at 881 (quoting *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1483 (3d Cir. 1990)).

<sup>97</sup> See LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 16-22 (2d ed. 1988). For general discussions of pluralistic democracy, see BENJAMIN R. BARBER, *STRONG DEMOCRACY* (1984); MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983).

<sup>98</sup> *Ellison v. Brady*, 924 F.2d 872, 888 (9th Cir. 1991).

<sup>99</sup> Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1989).

<sup>100</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS* 1988, 299 (1989) (table 3.19).

<sup>101</sup> *Ellison*, 924 F.2d at 879.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

woman standard.<sup>104</sup> The court justified its adoption of the reasonable woman standard by explaining that “a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women.”<sup>105</sup> The court explicitly denied that applying a reasonable woman standard establishes a “higher level of protection” for women than men, stating that instead, “a gender-conscious examination of sexual harassment enables women to participate on an equal footing with men.”<sup>106</sup> The court asserted that the “reasonableness” component of the reasonable woman standard protects defendants from “having to accommodate the idiosyncratic concerns of the rare hyper-sensitive employee,”<sup>107</sup> but also allows for adjustment of the standard as society becomes more sensitized to these issues.<sup>108</sup>

## V. CRITICISM OF THE REASONABLE WOMAN STANDARD

The Ninth Circuit’s rationale in *Ellison* is representative of that of courts adopting a reasonable woman standard.<sup>109</sup> As suggested previously, the adoption of a victim-specific standard requires that a court endorse a broad construction of the purpose of Title VII,<sup>110</sup> and that it accept pluralistic principles.<sup>111</sup> In evaluating the soundness of the reasonable woman standard, one must begin with an examination of the soundness of these underlying principles.

### A. Title VII Broadly Construed

The *Rabidue* majority opinion articulates the primary criticism of the broad construction of Title VII’s purpose when it quotes with approval the district court’s statement that although Title VII is the “federal court mainstay” for equal opportunity for women employees, “it is different to claim that Title VII

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<sup>104</sup> *Id.* Because the plaintiff in the case at bar was a woman, a reasonable woman standard was appropriate. The court pointed out that in a case in which the plaintiff was male, the appropriate standard for evaluating the hostile environment would be a “reasonable man” standard. *Id.* at 879 n.11.

<sup>105</sup> *Id.* at 879.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at n.12.

<sup>109</sup> See *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3d Cir. 1990) (applying a reasonable victim standard).

<sup>110</sup> See *supra* notes 20–26, 70–78 and accompanying text.

<sup>111</sup> See *supra* notes 92–105 and accompanying text.

was designed to bring about a magical transformation in the social mores of American workers."<sup>112</sup> This statement suggests that a conception of Title VII as an mechanism for hastening change would be both unrealistic and somehow improper, although neither the district nor appellate majority opinions explain why this is so.

The narrow constructions of Title VII's purpose advanced by the *Rabidue* and *Scott* majorities arguably leave the statute with very little to do. The dissent in *Rabidue* and the majority in *Ellison* effectively counter the argument for narrow construction by arguing that a narrow construction of Title VII would perpetuate rather than discourage and ultimately eliminate workplace harassment.<sup>113</sup> Title VII, functioning as the *Rabidue* majority would have it function, cannot effect a change in workplace norms that is out of step with societal norms. What the statute can do under a narrow construction is ensure that workplace norms do not lag behind societal norms. This seems an unlikely aspiration for "remedial" legislation such as Title VII, which grew out of an acknowledgment that various forms of discrimination in society are both pervasive and unacceptable.<sup>114</sup>

### B. Dangers Inherent in a Pluralistic Standard

Any standard incorporating pluralistic principles is open to criticism from two directions. Pluralism is the idea that cultural diversity is a positive good, deserving of legal and political protection, which ultimately enhances democratic society.<sup>115</sup> Because pluralism acknowledges the equal validity of diverse perspectives, it is an inclusive ideology. As noted above, criticism of pluralism can come from two nearly opposite directions. One criticism is that pluralism as an ideology is inherently relativist, and threatens to dangerously fragment any system and undermine any structure because it does not provide a system for ranking values or perspectives. It resists "standards," because

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<sup>112</sup> *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 621 (6th Cir. 1986).

<sup>113</sup> See *Rabidue*, 805 F.2d at 626; *Ellison v. Brady*, 924 F.2d 872, 876 (9th Cir. 1991); *supra* notes 70-80, 93-96 and accompanying text.

<sup>114</sup> The legislative history shows that discrimination based on sex was included in the Title VII prohibitions at the last minute, and the amendment was arguably offered as a joke. See 110 CONG. REC. H2577 (daily ed. Feb. 8, 1964) (statement of Rep. Smith). However, arguments that no legislative intent existed for passing remedial legislation prohibiting sex discrimination lose their force when viewed in light of subsequent case law recognizing gender discrimination, and in light of the 1991 Civil Rights Act which similarly prohibited gender discrimination.

<sup>115</sup> *TRIBE*, *supra* note 97, §§ 15-21.

standards by definition marginalize, and thus exclude certain perspectives from protection or validation. Thus, to embrace pluralism in a legal standard is to threaten to deconstruct the legal system into a nonstructure with no means of evaluating varying perspectives with regard to an issue or event.

There is, then, an inherent tension present in the creation of a "pluralistic standard," since the two concepts ("pluralism" and "standard") defy one another. Because of this tension, a "pluralistic standard" is not only vulnerable to criticism because of its relativist aspect, but conversely, it may be criticised for its normative aspect. In other words, no "standard" can be truly pluralistic, because to create a standard is to incorporate a normative component that is by definition exclusive of perspectives outside a particular range. I will briefly address both criticisms of a "pluralistic standard," and conclude that while each is valid, neither offers a more attractive alternative, and neither is sufficient to justify abandoning the reasonable woman or reasonable victim standard.

### 1. *The Deconstruction Criticism*

As noted above, the deconstruction criticism in its most elementary form suggests that injection of a multitude of diverse perspectives into legal standards threatens to undercut the notion that the law should have abstract continuity and general applicability.<sup>116</sup> Because there is an enormous body of legal and social scholarship surrounding deconstruction, I will limit my discussion to what a rejection of the reasonable woman standard based on a deconstructionist criticism would mean, and suggest that such a rejection is inconsistent with shared understandings about justice and the law.

The *Rabidue* dissent and the *Ellison* majority opinions provided informed and articulate discussions of the societal realities facing women employees in contemporary America.<sup>117</sup> If one accepts the data and information relied upon in these opinions, it follows that there is a difference in the way members of different groups (in those cases, women and men) experience and respond to negative and degrading representations of women and behavior toward women. A court accepting this premise has two options as it fashions a standard for evaluating hostile environment claims: it can incorporate the perspective of the victim into the standard and risk fragmentation of the law, or it can refuse to incorporate the perspective of the victim, thereby preserving the uniformity of the legal standard but denying the legal validity of the victim's perspective.

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<sup>116</sup> See, e.g., JONATHAN CULLER, ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM (1982); FRANK LENTRICCHIA, AFTER THE NEW CRITICISM (1980).

<sup>117</sup> See *supra* notes 70-78 and 92-103 and accompanying text.

Although the specter of a hopelessly fragmented legal system can be a powerful incentive to maintain coherence in the law, to do so by the means of either intellectual dishonesty (by denying that there is a difference in perspectives) or normative tyranny (by saying that there is a difference, but that the law will not recognize it) seems even more alarming than a system with diminished abstract continuity. For these reasons, a challenge to the reasonable woman or reasonable victim standard on deconstruction grounds must fail so long as society and the courts recognize that a difference in perspectives exists among different groups in society.

## 2. Normative Standards as Underinclusive

As discussed earlier, one criticism of a "pluralistic standard" is that by introducing a normative element, the "pluralism" is necessarily diminished because the standard marginalizes and excludes some perspectives. In her article, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*,<sup>118</sup> Nancy S. Ehrenreich presents the argument that a "reasonable woman" standard, or any standard including a "reasonableness" element, ultimately fails as a pluralist mechanism because the normative character cuts against the recognition of diversity.<sup>119</sup> Ehrenreich, like the majority in *Ellison* and the dissent in *Rabidue*, questions the appropriateness of a reasonable person standard, asking, "why, for example, in the context of antidiscrimination statutes designed to reform society, is a standard that is explicitly tied to the status quo thought to be a proper vehicle for identifying discriminatory behavior?"<sup>120</sup> Ehrenreich levels the same criticism at the reasonable woman standard, however, arguing that the "reasonableness" element ties the standard to racial, class, and other perceived norms among women, and asserting that "to the extent that a reasonable woman standard fails to draw the court's attention to issues of race and class, it may perpetrate existing inequities based on those factors in the same way the reasonable person standard does when it fails to consider women's point of view."<sup>121</sup> Ehrenreich asserts that normative standards of any kind directly conflict with the absolute tolerance for diversity that pluralism demands. She argues that new formulations (like the reasonable woman standard) of old constructs (like the

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<sup>118</sup> Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177 (1990).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 1218.

reasonable person standard) "will still merely reinforce and legitimate an unequal status quo" if the standards are presented as neutral.<sup>122</sup>

Ehrenrieck, dissatisfied with any normative standard, suggests as an alternative that "pluralism and tolerance for diversity should be viewed as part of an expanded commitment to the true sharing of social power."<sup>123</sup> She also calls for more expansive thinking about "the redistribution of power"<sup>124</sup> and the "hard choices—and losses—that true distribution would entail."<sup>125</sup>

## VI. CONCLUSION

As discussed above, the broad reading of Title VII is plausible when one considers the statute as a remedial measure not intended to function as a mechanism for maintaining the status quo regarding sex discrimination, but instead intended to facilitate real change. The reasonable woman or reasonable victim standard is unlikely to be effectively challenged as inconsistent with the intended function of Title VII, especially in light of Congress' passage of the 1991 Civil Rights Act.

The deconstruction criticism also fails to justify abandoning the reasonable woman or reasonable victim standard once one acknowledges that significant differences in perspectives exist among groups. To abandon a more pluralistic standard and deny members of diverse groups legal protection in order to preserve legal uniformity and general applicability seems fundamentally unacceptable. Also, to suggest that the differences among groups are so many and so profound that they threaten to break the system apart is to fail to recognize the many cultural and political ideals that we share, and which have a cohesive effect.

Ehrenreich's call for redistribution is attractive, yet she offers no practical guidance for how to effectuate such goals. Furthermore, her full-blown rejection of the reasonable woman standard on grounds that it falls short as a standard of inclusion is both premature and inconsistent with democratic jurisprudence and politics. Decisionmaking in a democracy, including judicial decisionmaking, is evaluated in terms of the integrity of the process, not in terms of the absolute propriety of the result. Intellectual honesty and open discussion of any decision may lead to adjustment and improvement of the result over time, and a decision which falls short of its stated goals does not

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<sup>122</sup> *Id.* at 1231.

<sup>123</sup> *Id.* at 1232.

<sup>124</sup> *Id.* at 1232–33.

<sup>125</sup> *Id.*

necessarily fail. It may be merely undeveloped. As long as the rationale presented for a decision is relatively honest, it will inform the debate on the issue and allow for further input and change.

Although it is far from perfect as a mechanism for recognizing and giving legal validity to diverse perspectives, the reasonable woman or reasonable victim standard recognizes more diversity than the reasonable person standard and strives to be inclusive of diverse perspectives. The adoption of the reasonable woman standard has also served to provoke debate on the issue of appropriate standards in sexual harassment cases. In light of these contributions, the adoption of the reasonable woman standard signals a step toward a more pluralistic standard and possibly a stage in the development of a more truly pluralistic legal system, and therefore should be retained.

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